

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ESTHER GOULD, et al.,)	Case No. C04-02213 JPD
)	
Plaintiffs,)	
)	ORDER GRANTING PLAINTIFFS'
v.)	MOTION TO ADD DEFENDANT,
)	DENYING DEFENDANT'S MOTION
GORDON MOVING SERVICES, INC.,)	TO DISMISS, AND DENYING
)	PLAINTIFFS' MOTION FOR
Defendant.)	SUMMARY JUDGMENT

This matter comes before the Court upon plaintiffs' motion to add a defendant (Dkt. No. 14), plaintiffs' motion for summary judgment (Dkt. No. 15), and defendant's motion to dismiss (Dkt. No. 18). Having carefully reviewed the pleadings, supporting materials, and balance of the record, the Court ORDERS as follows:

(1) Plaintiffs' motion to add a defendant (Dkt. No. 14) is GRANTED. Plaintiff filed this action alleging that she sustained damages to her property due to the negligence of Gordon Moving Services, Inc. It appears from the evidence supplied by the defendant that Gordon Moving Services, Inc., was not incorporated until sometime after the move. Instead, Randy Gordon performed moving services as a sole proprietorship at the time of the move. Plaintiffs are seeking to add Randy Gordon as a defendant. Plaintiffs argue that failure to add Randy Gordon will prevent them from obtaining "complete relief" and that Mr. Gordon will not be prejudiced by

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01 being added. Defendant responds that plaintiffs' motion should have been brought under Fed. R.
02 Civ. P. 15 and that plaintiffs must now seek leave of the Court to amend their complaint in order
03 to add Mr. Gordon. (Dkt. No. 25).

04 The "principal function of [the Federal Rules of Civil Procedure] should be to serve as
05 useful guides to help, not hinder, persons who have a legal right to bring their problems before the
06 courts." *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986) (citations omitted). "[D]ecisions on the
07 merits are not to be avoided on the basis of mere technicalities." *Id.* Rather, the rules are to be
08 used to ensure a "just, speedy, and inexpensive determination of every action." Fed. R. Civ P. 1.

09 Under Fed. R. Civ. P. 15, after a responsive pleading has been served "a party may amend
10 the party's pleading [to add a party] only by leave of court or by written consent of the adverse
11 party." Fed. R. Civ. P. 15(a). Additionally, the court may add parties "at any stage of the action
12 and on such terms as are just." Fed. R. Civ. P. 21; *see, e.g. Pena v. McArthur*, 889 F. Supp. 403
13 (E.D. Cal. 1994) (indicating that the rule applies beyond the need to correct misjoinder of parties).

14 Here, plaintiffs have shown that the interests of justice and judicial economy favor adding
15 Mr. Gordon as a defendant. Plaintiffs' potential to recover for Mr. Gordon's alleged damage to
16 their property should not be foreclosed because of their failure to initially name him as a defendant,
17 nor for their chosen method of adding him. Moreover, the defendant Gordon Moving Services,
18 Inc., will not be prejudiced by the addition of Mr. Randy Gordon as a party. As a result, the Court
19 will treat the plaintiffs' motion to add a party as a motion to amend the complaint, and the
20 plaintiffs are directed to file an amended complaint, naming Mr. Gordon as a party, and to
21 properly serve him.

22 (2) Defendant's motion to dismiss (Dkt. No. 18) is DENIED. Defendant argues in its
23 motion to dismiss that plaintiffs' suit cannot succeed as a matter of law because it was not in
24 existence (e.g., had not been incorporated) at the time the alleged harms occurred. (Dkt. No. 18).
25 Further, defendant argues that it is entitled to summary judgment because plaintiffs have failed to
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01 demonstrate an essential element of their case — the defendant’s legal existence. (Dkt. No. 18).
02 Plaintiffs respond that summary judgment should not be granted because the defendant may be
03 found liable under a theory of successor liability. (Dkt. No. 24).

04 A party may bring a motion to dismiss for “failure to state a claim upon which relief can
05 be granted.” Fed. R. Civ. P. 12(b)(6). If, however, such a motion relies upon “matters outside
06 the pleadings . . . the motion shall be treated as one for summary judgment and disposed of as
07 provided in Rule 56, and all parties shall be given a reasonable opportunity to present all material
08 made pertinent to such a motion by Rule 56.” *Id.*

09 The Court construes defendant’s motion to dismiss as a motion for summary judgment
10 because it relies on information beyond the pleadings. Specifically, defendant’s motion relies on
11 the declaration of Randy Gordon to argue that the defendant corporation did not exist at the time
12 of the alleged harm. (Dkt. Nos. 18, 19).

13 A party is entitled to summary judgment “if the pleadings, depositions, answers to
14 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
15 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter
16 of law.” Fed. R. Civ. P. 56(c). In determining whether a genuine issue of material fact exists, the
17 Court must view all evidence in the light most favorable to the nonmoving party and draw all
18 reasonable inferences in that party’s favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50
19 (1986). An issue of material fact exists if the evidence is such that a reasonable jury could find for
20 the nonmoving party. *Id.* at 248.

21 Construing all of the evidence in a light most favorable to the plaintiffs, defendant has failed
22 to demonstrate at this stage that it is entitled to a judgment as a matter of law. Plaintiffs argue
23 that, even if defendant was not yet incorporated at the time the alleged harms occurred, defendant
24 could be held liable under a theory of successor liability. (Dkt. No. 24). Under Washington law
25 courts will impose successor liability when (1) a purchaser expressly or impliedly assumes a
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01 predecessor's liabilities; (2) a purchase constitutes a de facto merger or consolidation; (3) the
02 purchaser is a mere continuation of the seller; or (4) a transfer of assets is for the fraudulent
03 purpose of escaping liability. *Martin v. Abbot Laboratories*, 102 Wn. 2d 581, 609 (1984) (internal
04 citations omitted). Thus, plaintiffs have articulated a legal theory by which defendant could be
05 held liable, even if it wasn't incorporated at the time of the alleged harm.

06 Finally, plaintiffs have initiated discovery in this case. Although their response did not
07 include a Rule 56(f) declaration, plaintiffs' response to the motion indicates that summary
08 judgment at this stage is premature, particularly when an additional plaintiff will be added. The
09 defendant's motion is DENIED without prejudice to renew the motion after discovery is
10 completed.

11 (3) Plaintiff's motion for summary judgment (Dkt. No. 15) is DENIED. Plaintiffs
12 argue that they are entitled to summary judgment because defendant damaged their property in
13 violation of 49 U.S.C. § 14706(a), which imposes absolute liability for an actual loss or injury to
14 property incurred in interstate commerce. They argue that they contracted with defendant to move
15 their property from California to Washington, that defendant damaged their property during the
16 move, and that defendant is therefore liable for the damage. Plaintiffs also argue defendant is liable
17 under a theory of negligence.

18 Defendant responds that summary judgment cannot be granted against Randy Gordon
19 because he has not yet been added as a defendant and that, if he has been properly added, the time
20 period after which a motion for summary judgment may be brought has not yet elapsed. Defendant
21 also argues that summary judgment is not appropriate here because it had not yet been
22 incorporated at the time of the alleged harms and that the declaration of Joanne Gould and its
23 supporting exhibits A through H, (Dkt. No. 16), upon which plaintiffs' motion relies, should be
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01 stricken because the declaration is based on inadmissible hearsay. (Dkt. No. 25).¹

02 Construing the evidence in a light most favorable to defendant, plaintiffs' motion for
03 summary judgment is denied. Plaintiffs have not demonstrated that the only current defendant to
04 this action, Gordon Moving Services, Inc., was either incorporated at the time of the alleged harm,
05 nor that defendant satisfies the elements necessary to establish liability under a theory of successor
06 liability. Genuine issues of material fact exist as to the precise nature of defendant's relationship
07 to Gordon Moving Services.

08 DATED this 25th day of May, 2005.

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12 JAMES P. DONOHUE
13 United States Magistrate Judge
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23 ¹In light of the Court's ruling on plaintiffs' motion for summary judgment (Dkt. No. 15),
24 defendant's motion to strike (Dkt. No. 25) is denied. Plaintiffs are reminded, however, if they file
25 a subsequent motion for summary judgment, their obligation to support any motion for
26 summary judgment by admissible evidence. Fed. R. Civ. P. 56(c).

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